

THE HON'BLE SRI JUSTICE B. SUDERSHAN REDDY
AND
THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

WRIT PETITION NO.8543 OF 2005

Date: 24.08.2005

Between:

S.Kanitha Reddy, W/o Keshav Reddy, Aged: 36 years, Occ: Business, R/o 2-4-31,
Besides Tarbund Human Temple, Secunderabad – 500 009.

... Petitioner

and

1. The Executive Officer, Cantonment Board, Secunderabad. And another.

... Respondents.

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AND
THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

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ORDER: (per Sri Ramesh Ranganathan,J)

1. Entrustment of collection of Octroi and Toll Tax, for the financial year 2005-2006, in favour of the 2nd respondent, is questioned in this writ petition, as being contrary to condition No.8 and 10 of the tender conditions and a direction is sought to the first respondent to notify tenders afresh, after forfeiting the EMD and Security Deposit of the 2nd respondent.

2. Facts, to the extent necessary for this writ petition, are that, each year the 1st respondent invites tenders for granting rights of collection of Octroi and Toll tax for all vehicles passing through the Cantonment area. Pursuant to the tender notice, issued for the financial year 01.04.2005 to 31.03.2006, while six firms, including the petitioner herein, purchased tender forms, the only tender submitted was by the 2nd respondent. It is the petitioner's case that while she had obtained demand drafts for Rs.26.50 lakhs, she did not submit her tender in view of the onerous conditions prescribed in condition NO.8 of the tender conditions, that several tenderers had requested the respondent authorities to relax the prescription of depositing 1/3rd of the tender amount, within ten days of communication of acceptance of the tender by the respondent and, in view of the closure of the financial year on 31.03.2005, had sought further time of ten days from 01.04.2005 for payment of the 1/3rd tender amount. It is her case that the respondent authorities had informed that there would not be any relaxation of the prescribed conditions and in the event of non-payment of 1/3rd of the tender amount, within the prescribed ten days, the Earnest Money Deposit and Security Deposit would be forfeited and the tender would be awarded to the next highest bidder. This categorical refusal of the 1st respondent to relax condition No.8 is said to be the reason for, the petitioner and other tenderers, not participating in the tender process and that the 2nd respondent, in collusion with the 1st respondent, had alone filed his bid. It is stated that, while the 2nd respondent's tender of Rs.5.30 crores was intimated as having been accepted on 19.03.2005 and the 2nd respondent was obligated, under condition No.8, to deposit 1/3rd of this amount i.e., Rs.1,76,66,000/- by 29.03.2005, despite his failure to do so by 29.03.2005, he was permitted by the 1st respondent to start collecting both Octroi and Toll tax from 01.04.2005. It is stated that other tenderers along with socially conscious residents in the Cantonment area, like Sri G.Vittal Reddy, had sent a notice to the 1st respondent on 31.03.2005 informing that in spite of the 2nd respondent not fulfilling condition No.8, he had been authorized to collect Octroi and Toll tax. It is also stated that the 2nd respondent had submitted a representation seeking time till 02.04.2005 to deposit the amount and had again sought further time till 05.04.2005, on which date also the amount was not paid. It is alleged that the 1st respondent, in collusion with the 2nd respondent, had accepted the sole tender knowing fully well that the 2nd respondent would not be able to fulfil condition No.8,

and that as against the prescription of collection of Rs.5/- per vehicle, the 2nd respondent, in gross violation of the tender conditions, was collecting Rs.60/- per vehicle.

3. In her additional affidavit, the petitioner expressed her willingness to tender the same amount of Rs.5.30 crores, as had been offered by the 2nd respondent, while seeking proportionate reduction in view of the reduction in the period of collection for the tender year 2005-2006.

4. The 1st respondent, in his counter affidavit, denies the allegation that the petitioner had sought for relaxation of condition NO.8 of the tender condition and submits that this allegation is a mere invention for the purpose of this writ petition. Allegations of collusion and that the 2nd respondent was collecting Rs.60/- per vehicle, as against the tender condition of Rs.5/- per vehicle, are denied. Locus standi of the petitioner, to file the present writ petition, is questioned as she had failed to submit the tender schedule and to participate in the tender process despite procuring the tender documents. It is stated that sealed tenders were opened on 17.02.2005 and since the 2nd respondent had submitted his tender offering a sum of Rs.3.70 crores towards lease of collection rights of Octroi and a sum of Rs.1.60 crores towards collection of Toll tax, which was much higher than the previous year 2004-2005 and had resulted in the Cantonment Board being benefited by nearly Rs.1.00 crore, a special Board Meeting was held on 18.02.2005 whereat it was unanimously resolved to accept the single tender offered by the 2nd respondent subject to approval of the General Officer Commanding in Chief, Southern Command, Pune. A detailed letter was addressed to the Southern Command, Pune on 02.03.2005 seeking approval and in turn the Director, Defence Estates, vide letter dated 14.03.2005, is said to have requested the Cantonment Board to take appropriate decision for allotting the lease, of collection of rights of Octroi and Toll tax, in its best financial interests. Consequently proceedings dated 14.03.2005 was issued in favour of the 2nd respondent approving his tender for collection of Octroi and Toll tax. The 2nd respondent was requested to make arrangements for deposit of 1/3rd of the Octroi bid, and 1/3rd of the bid towards Toll tax, within ten days, as stipulated in condition No.8. It is stated that since the 2nd respondent received the intimation on 19.03.2005 he was required to pay the 1/3rd stipulated amount on or

before 29.03.2005. The 2nd respondent is said to have paid Rs.48,50,000/- on 29.03.2005 and Rs.23,00,000/- on 31.03.2005 towards part payment of 1/3rd amount and to have simultaneously requested time till the 1st week of April 2005 for payment of the balance amount. It is stated that though the 2nd respondent had paid Rs.93,50,000/- as against Rs.1,76,66,668/-, the 1st respondent was compelled to handover the rights of collection of Toll tax and Octroi on 31.03.2005 as the term of the previous contractor had expired on that day and no one else was available to continue collections. It is stated that while there are 12 entry points, spread all over the Cantonment limits, the Cantonment Board does not have the wherewithal to deploy the required staff of 150 members for round the clock supervision and collection thereat, and as the bid offered was nearly more than Rs.1.00 crore higher than the previous year's bid amount, the Board had decided to continue the 2nd respondent though he did not pay the entire 1/3rd amount as prescribed in condition No.8. It is stated that the Board had taken all necessary steps for collecting the balance 1/3rd amount and had issued notice in this regard to the 2nd respondent on 15.04.2005, pursuant to which the 2nd respondent is said to have paid the entire balance, of the 1/3rd bid amount, in two instalments on 25.04.2005 and 26.04.2005. It is stated that condition No.8 was never seriously followed in the previous years also and there were several instances earlier when the contractors were extended time, beyond the prescribed ten days, for payment of 1/3rd lease amount, that the same benefit had also been extended to the petitioner's husband when he was allotted the contract for the year 2000-2001, and that the petitioner cannot plead ignorance of this practice being adopted by the Board all these years. It is stated that there are no instances of the Cantonment Board having cancelled any contract invoking condition No.8 even in case of default in payment of the 1/3rd amount within ten days. It is contended that the petitioner has approached this Court, with unclean hands, suppressing material facts. It is stated that in addition to the 1/3rd amount, the 2nd respondent had subsequently paid two monthly instalments, at the time of filing of the counter affidavit.

5. In his Counter affidavit the 2nd respondent, while reiterating the factual averments, referred to in the counter affidavit of the 1st respondent, also denied the allegation that he is collecting Rs.60/- instead of Rs.5/- for each vehicle. It is stated that the

established practice followed by the Board, for several years, is not to impose the rigour of condition No.8 as huge amounts are to be arranged by the highest bidder towards payment of 1/3rd tender amount, and that no special treatment was given to him except to follow the earlier practice.

6. Conditions 8 and 10 of the tender conditions read thus:

“8.The successful tenderer shall pay to the Cantonment Board 1/3rd of the tendered amount within 10(Ten) days of the communication of acceptance of his tender and the balance amount shall be payable in 9(nine) monthly equal instalments on or before 5th of every month commencing from 01 April, 2005 or from the date of approval, by Demand Draft/Pay order only, drawn in the favour of the Executive Officer, Secunderabad Cantonment Board on any Nationalized Bank/Scheduled Bank. Cheques/cash will not be accepted towards equal monthly instalments. Any default in payment of instalment shall entitle the Board to terminate the grant of rights of collection of octroi forthwith. Further, the Board shall have the right to claim interest @ 24% per annum on the defaulted instalments from the date of default till the date of full and final payment in addition to exercising the right to cancel the grant of right of collection of octroi.

10. In the event of has failure to comply with the foregoing conditions the Cantonment Board shall be at liberty to forfeit the Earnest Money Deposit and Security Deposit and dispose off the lease of collection rights of Octroi afresh at the risk and cost of the defaulting successful tenderer”

7. Sri A.Sudershan Reddy, learned counsel for the petitioner, submits that it is not open the respondent authorities to give a go bye to the tender conditions and if the authorities intended to relax these conditions, such relaxation should have been specified in the tender conditions itself, thereby enabling intending tenderers, who did not participate in the tender process in view of such conditions being imposed, to also participate in the tender process. Learned counsel would submit that it is not open to the authorities to pick and choose persons to whom contracts are to be awarded, rights granted or largesse conferred as such selective relaxation would violate Article 14 of the Constitution of India.

8. Sri Y.V.Ravi Prasad, learned counsel for the 1st respondent submits that tender conditions No.8 and 10 have never been strictly enforced in the previous years, this condition has always been relaxed and time extended for payment of earnest money

deposit. Learned counsel would submit that the petitioner's husband was himself a beneficiary of such relaxation when he was awarded the contract in the year 2000-2001, and that the petitioner being aware, that these conditions were being relaxed every year, ought to have submitted her tender and participated in the tender process. Learned counsel would submit that the 2nd respondent was the sole tenderer and had bid nearly Rs.1.00 Crore higher than the previous year's bid amount. Learned counsel submits that condition No.8 which entitled the Board to terminate the grant of rights or to claim interest at the rate of 24% per annum relates to instalments payable by the successful tenderer and not to the initial payment of 1/3rd lease amount. It is contended that, in addition to the 1/3rd lease amount required to be paid by the tenderer, within 10 days of communication of acceptance of his tender, the remaining 2/3rd amount is required to be paid in nine equal monthly instalments on or before the 5th of every month and it is for failure to comply with this requirement of payment of monthly instalments that the Board has been empowered either to terminate the grant or to claim interest at 24% per annum. Learned Counsel would submit that, on a strict construction, condition No.8 cannot be invoked for default in payment of the initial 1/3rd tender amount, as it relates only to default in payment of instalments. It is contended that the Board has the inherent power either to extend or relax condition No.8, beyond the period of ten days, and in the present case such relaxation is justified. Condition 10, according to the learned counsel, merely enables the Cantonment Board to forfeit E.M.D. and security deposit and it is not mandatory that, in every case of belated compliance, this clause is required to be invoked. Learned Counsel would submit that, in the facts and circumstances of the present case, the 1st respondent was justified in granting further time to the 2nd respondent for payment of the 1/3 of the tendered amount since he was the sole bidder and had bid nearly Rs.1.00 crore more than the highest bid for the previous year.

9. Sri D. Prakash Reddy, learned Senior Counsel, appearing for the 2nd respondent, refers to the letter dated 31-3-2005 submitted by the Secunderabad Cantonment Citizen's Civic Amenities Committee, (relied upon by the petitioner), wherein it is stated that for the last decade, successful bidders were never required to follow condition 8, and that the said past practice should be put an end to. Learned Senior Counsel would submit that the petitioner was well aware that condition No.8 was all

along being relaxed, as is clear from the representation dated 31-3-2005 itself, besides the fact that her husband was himself a recipient of such benevolence, of the 1st respondent, having been granted relaxation of condition No.8 for the year 2000-01. Learned Senior Counsel further submits that it is well settled that while certain conditions, which are pre-qualifications for being awarded a contract, are to be strictly enforced, condition Nos.8 and 10 are conditions which require compliance after the contract is awarded and that the several judgments of the Supreme Court from **“Ramana Dayaram Shetty v. International Airport Authority of India”** onwards and the judgments of this Court, which relate to compliance of the eligibility criteria which are prerequisites for participation in the tender process, would not apply to the present case wherein non-compliance is of a condition which comes into operation subsequent to the award of contract. Learned Senior Counsel submits that Conditions No.8 and 10 merely give an option and that it is open to the 1st respondent, in the facts and circumstances of a given case, to relax the said conditions. Learned Senior Counsel would submit that the 2nd respondent has, till date, already made payment of a sum in excess of Rs.4.00 crores as against the total amount required to be paid of Rs.5.30 Crores, and since a substantial portion of the amount has already been paid and five months, of the 12 month contract period, has already elapsed, equities are in favour of the 2nd respondent and not the petitioner, who did not even choose to submit her bid and participate in the tender process.

10. While the contention of the Sri A.Sudershan Reddy, that relaxation of tender conditions cannot be selectively applied, is not without merit nor do we find justification in the submission of the learned counsel for the 1st respondent that relaxation of these conditions for the past ten years would by itself mean that these conditions are best ignored, we are satisfied that, in the facts and circumstances of the present case, no interference is called for.

11. Admittedly, in the present case, the petitioner has not submitted a written representation to the 1st respondent seeking relaxation of the rigour of condition NO.8. Her contention that she had made a request to the 1st respondent to relax condition No.8 and that the same was refused, is denied by the 1st respondent. Reliance is placed by the petitioner on the letter dated 31-3-2005 which reveals that the petitioner was well aware that condition No.8 has not been followed by the

Board for the past decade. It is therefore hard to believe that prescription of this condition prevented the petitioner from participating in the tender process, more so, when the petitioner's husband was himself a beneficiary, of relaxation of this condition, in the year 2000-01, which specific averment in the counter affidavit has not been denied by the petitioner. Since the petitioner was well aware that these conditions were relaxed earlier, her non-participation in the tender process is for reasons otherwise and not on account of the so-called onerous stipulation prescribed in condition Nos.8 and 10 of the tender conditions. Having failed to participate in the tender process, for which the petitioner had admittedly obtained tender documents, and in the absence of any challenge to condition Nos. 8 and 10 of the tender conditions in this writ petition, it is not open to the petitioner to seek cancellation of the contract awarded in favour of respondent No.2. We see no reason to exercise our discretion in the petitioner's favour as she had not even submitted her bid whereas the 2nd respondent, who was the sole tenderer, had bid an amount of Rs.5.30 crores which is nearly Rs.1.00 crore more than the previous year's bid.

12. It is well to remember that the jurisdiction of this Court under Article 226 of the Constitution of India is discretionary and a Writ is not issued as a matter of course. A writ of mandamus is not a writ of course or a writ of right, but is, as a rule, discretionary (**C.R.Reddy Law College Employees' Association, Eluru, W.G.District Vs. Bar Council of India, New Delhi**). It is well settled that the power exercised by this Court, under Article 226 of the Constitution of India, is purely discretionary and need not be exercised in every case where there is an error of law. One of the limitations imposed by this Court, on itself, is that it would not exercise jurisdiction unless substantial injustice has ensued or is likely to ensue. It would not allow itself to be turned into a court of appeal to set right mere errors of law which do not occasion injustice. (**Sangram Singh Vs. Election Tribunal, Kotah**). While the State, its instrumentalities and agencies have the public duty to be fair to all concerned, even when some defect is found in the decision making process, this Court will exercise its discretionary power, under Article 226 of the Constitution of India, with great caution and only in furtherance of public interest and not merely on the making out of a legal point. This Court is required to keep larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to the conclusion that overwhelming public interest requires interference,

would it intervene in the matter. (**Air India Limited Vs. Cochin International Airport Limited**)

13. We find considerable force in the submission of Sri D.Prakash Reddy, learned Senior Counsel that the judgments of the Supreme Court in **International Airport Authority (1 supra)** and other cases and the judgments of this Court, wherein relaxation of the eligibility criteria prescribed for participation in the tender process has been held to violate Article 14, would not apply to the present case wherein non-compliance is of a condition requiring performance after the contract is awarded. We also find force in the submission of Sri Y.V.Raviprasad, learned counsel for the 1st respondent, that the default clause in condition No.8 would apply only in case of non-payment of monthly instalments and not the 1/3rd tender amount, as also the contention that condition No.10 is merely an enabling clause and it is not necessary that in every case of belated compliance, this condition has necessarily to be invoked.

14. We do not, however, propose to enter into a detailed examination, of conditions No.8 and 10 of the tender conditions, as we are satisfied that no injustice, much less, substantial injustice, has resulted in the present case necessitating exercise of the discretionary jurisdiction of this Court under Article 226 of the Constitution of India. We find that acceptance of the tender of the 2nd respondent has resulted in increase in the revenues of the Secunderabad Cantonment Board by nearly Rs.1.00 Crore more than what had received in the previous financial year, which is undoubtedly in larger public interest. We are not impressed by the petitioner's averment, in the additional affidavit, that she is willing to match the bid submitted by the 2nd respondent, as nothing prevented her, if she really intended to do so, from participating in the tender process, more so as she had applied for and had obtained the tender schedules. For reasons afore mentioned, we are unable to persuade ourselves to accept the submission that the petitioner's failure to submit her bid was on account of the stringent requirements of condition Nos. 8 and 10 of the tender conditions.

15. We find no reason to interfere in the award of contract in favour of the 2nd respondent. Before parting with the case, we must however express our anguish at

the repeated relaxation of the tender conditions for the past decade by the 1st respondent. We feel it necessary to reiterate, what has been held in a catena of judgments of the Supreme Court and this Court, that tender conditions are required to be strictly adhered to. If tender conditions are being repeatedly relaxed, year after year, it defies reason as to why such a condition continues to be prescribed. If these two conditions, (conditions No.8 and 10), were considered unnecessary by the 1st respondent, it should have them deleted as there exists the possibility of these conditions preventing other tenderers from participating in the tender process. The 1st respondent would be well advised to examine, at least for the next financial year, as to whether any purpose is served in retaining these conditions and in case it chooses to retain them to ensure their strict compliance.

16. The writ petition fails and is accordingly dismissed. There shall, however, be no order as to costs.

B.Sudershan Reddy,J

Dt. .08.2005

Ramesh Ranganathan,J

ASP/MRKR

